IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1755

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - - Petitioner

versus

JOHN E. HAYCRAFT, et al. - - Respondents

versus

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, et al. - - Respondents

(Other parties respondent on inside cover)

BRIEF OF RESPONDENTS, BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL.

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Additional Respondents in this case are Lyman Johnson, Richard Miller, Aaron Howard, John Schmidt, Earl Alluisi, John R. Hughes, Sarah White, Johnie Wright, Suzanne Post, Hazel K. Lane, American Federation of Teachers, Jefferson County Federation of Teachers, Local 672, and the Kentucky Human Relations Commission.

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AUTHORITIES

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BRIEF OF RESPONDENTS, BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL.

STATEMENT OF THE CASE

The District Court in 1973 in consolidated desegregation cases involving the City of Louisville, Kentucky and Jefferson County, Kentucky, dismissed the Complaint of civil rights plaintiffs, and determined that the two school systems were unitary and not in violation of the Constitution. The United States Court of Appeals for the Sixth Circuit, in *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky*, 489 F. 2d 925 (1973) remanded to the Dis-

trict Court with directions to eliminate "all vestiges of state-imposed segregation". This Court vacated the judgment of the Court of Appeals in light of *Milliken* v. *Bradley,* 418 U. S. 717 (1974), and the Court of Appeals reinstated, with minor modifications, its Judgment in 1974, 510 F. 2d 1358. This Court denied certiorari in 1975, 421 U. S. 931, 95 S. Ct. 1658, 44 L. Ed. 2d 88. In the consolidated cases, *Cunningham* v. *Grayson and Newburg Area Council, Inc., et al.* v. *Board of Education of Jefferson County* and *Haycraft, et al.* v. *Board of Education of Jefferson County,* 541 F. 2d 538, the Court of Appeals, on August 23, 1976, approved the District Court's adoption of a desegregation plan using system-wide racial compositions which the Board contended were arbitrary racial ratios and exceeded the remedial discretion of the District Court in light of the constitutional violation found to exist by the Court of Appeals previously. The Board of Education sought certiorari in this Court which was denied in 1977, —— U. S. ——, 97 S. Ct. 813, rehearing was denied in —— U. S. ——, —— S. Ct. ——, 45 L.W. 3635 (March, 1977).

While the foregoing proceedings were in progress, Petitioner in this action, L. J. Hollenbach, County Judge, had obtained the authority of the District Court to intervene for the purpose of bringing before the District Court an alternative desegregation plan.

On May 18, 1976, the District Court conducted an evidentiary hearing and during the testimony of Professor James C. Coleman, a sociologist, the first witness introduced by the Intervenor, dismissed the Intervenor,

out of hand (Appendix, pages 113-114). The Court of Appeals, on March 11, 1977, dismissed the Intervenor's appeal as unsubstantial, denying oral argument (Appendix, pages 25-26). The Intervenor filed a timely petition for writ of certiorari on June 8, 1977.

The Respondents, Board of Education of Jefferson County, Kentucky and Ernest Grayson, Superintendent, support the position of the Intervenor in his contention that the District Court and the Court of Appeals have erroneously approved the imposition of a system-wide remedy which raises racial ratios to a substantive constitutional right without regard to the degree of constitutional violation.

ARGUMENT

Had the Petitioner-Intervenor confined the petition for writ of certiorari to the sole question of whether or not the District Court and the Court of Appeals denied the Intervenor due process and the full hearing on the merits to which the Intervenor was entitled, the Respondents, Board of Education and its Superintendent, would have less reason to respond to the Petition. However, the Petitioner-Intervenor not only addresses this procedural question, but also undertakes to urge substantive aspects as to the merits of the Intervenor's plan.

The Respondents, having had no opportunity to cross-examine the Intervenor's witnesses, are unable to determine what position the Board would take as to the constitutionality and administrative feasibility of such a plan and accordingly, the Board of Education, in the

Court of Appeals, concurred with the Intervenor's request that the case be remanded to the District Judge for an appropriate evidentiary hearing with instructions concerning the proper determination of the Intervenor's plan as an adequate and appropriate remedy for any consitutional violation found to exist.

The Intervenor correctly asserts that this Court's decisions in *Washington* v. *Davis,* 426 U. S. 220, 96 S. Ct. 2040 (1975), and in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* —— U. S. ——, 97 S. Ct. 555 (1977), and in *Austin Independent School District* v. *United States,* 97 S. Ct. 518 (1976), determined that the Constitution does not require the elimination of *all* racially identifiable schools where the racial character of those schools *is not* the result of wrongful state action. These cases, and the more recent decision of this Court in *Dayton Board of Education* v. *Brinkman,* 76-539, —— U. S. ——, —— L.W. ——, in which an opinion was rendered June 27, 1977, require the District and Appellate courts to survey the current condition of segregation resulting from intentional state action and to take such appropriate remedial steps as will correct the situation.

The Court of Appeals in its opinion overturning the District Court's findings that there was a unitary system in Jefferson County and detecting the existence of some vestiges of state-imposed segregation, did not find evidence that but for such violation, Louisville and Jefferson County school systems would have been integrated to the extent contemplated by the plan later imposed by the District Judge.

The observation in the opinion of Mr. Justice Powell in *Austin, supra,* seems particularly appropriate:

> "The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was co-extensive with the constitutional violations, it adopted a view of constitutional obligation of a school board far exceeding anything required by this Court." *Austin, supra,* at 519.

As we read the opinion in *Dayton,* where the lower court's order rested on a finding of three violations consisting of racially imbalanced schools, optional attendance zones and rescinding by the Board of certain resolutions, this Court determined that even when those findings were judged in the strongest light favorable to the plaintiffs in the case, "the court of appeals simply hadn't any warrant for imposing the system-wide remedy".

There was never a finding by the District Court or the Court of Appeals in the Louisville and Jefferson County cases *(Newburg Area Council* v. *Board of Education of Jefferson County, Ky.* and *Cunningham* v. *Grayson, supra)* of what incremental segregative effect any of the violations by either school system had on the racial distribution of the Louisville and Jefferson County school populations as then constituted. The Court of Appeals, in overturning the District

Court, merely found that there were vestiges of state-imposed segregation remaining, without defining those vestiges. In its opinion approving the District Court's ultimate plan, *Cunningham* v. *Grayson*, 541 F. 2d 538 (1976), the Court of Appeals seized upon language that it found in the *Keyes* case that "whether a school system is illegally segregated by reason of statutory separation of the races or by reason of past segregative acts of school authorities, the scope of the remedy must in either case be system-wide."

There was no attempt by the District Court or the Court of Appeals to design a remedy commensurate with the impact of whatever intentional segregation was found, but on the contrary, a system-wide remedy imposing inflexible racial ratios (each school must have a white majority) was imposed by the District Court and approved by the Court of Appeals simply because it concluded that where the school system fails to propose a constitutionally sufficient desegregation plan, "the scope of a District Court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies". The Court of Appeals concluded that the District Court's plan was "well within the district judge's judicial discretion". This, of course, begs the question, since the Court of Appeals in its opinion overturning the District Judge, gave no direction as to the nature of what intentional state action the school board had participated in nor what degree of segregation resulted therefrom as opposed to the segregation within the system directly at-

tributable to social factors over which the school board had no control.

The colloquy between the District Judge and counsel for the Intervenor found at pages 110 to 112 of the Appendix herein and the Memorandum Order and Opinion dismissing the Intervenor (Appendix, page 113), plainly demonstrate that the District Court and subsequently the Court of Appeals concluded that regardless of the cause thereof any school which was *racially identifiable* in the school system was a vestige of former invalid state law and therefore state action requiring a *system-wide remedy*.

We think that the District Court and the Court of Appeals erroneously concluded that the imposition of a system-wide remedy was *the only way* to correct the constitutional violations found to exist in Jefferson County, Kentucky.

CONCLUSION

We respectfully submit that this Court should grant the petition for writ of certiorari by the Intervenor. We urge the Court to remand this matter to the District Court for a determination as to the school board's role in the creation of segregation (state action) requiring the District Court to reconsider, and if necessary, to receive additional evidence on the subject of intentional discrimination on the part of the school board and requiring the District Court to make a finding as to the incremental segregative effect of the school board's violations, and further requiring the District

Court to design a remedy commensurate with this impact. Thus, Louisville and Jefferson County will receive the same treatment as Dayton for the same legal reasons.

Respectfully submitted,

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